INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Jurisdiction	2
Statutes involved	2
The issues and the rulings below	7
The questions are substantial	12
Appendix "A"—Opinion of the Supreme Court of Pennsylvania	16
Appendix "B"—Opinion of the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Lehigh Valley Railroad Co.*	17
Appendix "C"—Opinion of the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Pittsburgh School District*	24
Appendix "D"—Opinion of the Supreme Court of Pennsylvania in the Appeal of Fidelity-Philadelphia Trust Co.	26

Table of Cases Cited

Citizens Bank of Michigan City v. *Opperman*, 249 U. S. 449	2
Commonwealth v. *Lehigh Valley R. R. Co.*, 104 Pa. 89, 186 Pa. 235, 40 A. 491, 244 Pa. 241, 90 A. 564	9
Commonwealth v. *Safe Harbor Water Power Corp.*, 43 Daup. 415	9
Commonwealth v. *School District of Pittsburgh*, 343 Pa. 394	11
Heiner v. *Donnan*, 285 U. S. 312	14
Hoeper v. *Tax Commission*, 284 U. S. 206	14
Kansas City Southern Railway Co. v. *Road Improvement District No. 3 of Sevier County, Arkansas*, 266 U. S. 379	2
Miller v. *Schoene*, 276 U. S. 272	2
Schlessinger v. *State of Wisconsin*, 270 U. S. 230	14

Page

Schuylkill Trust Co. v. *Commonwealth of Pennsylvania*, 296 U. S. 113 15
Senior v. *Braden*, 295 U. S. 422 15
St. Louis Southwestern Railway Co. v. *Arkansas, ex rel. Norwood*, 235 U. S. 350 15
Wyoming Valley Ice Co., In re, 145 Fed. 267 9

STATUTES CITED

Act of Commonwealth of Pennsylvania of May 1, 1909, P. L. 198 8
Act of the Commonwealth of Pennsylvania of June 17, 1913, P. L. 507, Sections 17 and 18, as amended by the Act of the Commonwealth of Pennsylvania of July 13, 1923, P. L. 1085 2
Act of the Commonwealth of Pennsylvania of July 21, 1919, P. L. 1067, amending Section 4 of the Act of June 30, 1885, P. L. 193 4
Act of the Commonwealth of Pennsylvania of July 17, 1936, P. L. 51 5
Constitution of Pennsylvania, Article IX, Section 1 .. 8
Constitution of the United States:
Article I, Section 10 8
14th Amendment 8
Judicial Code, Section 237a, as amended (January 31, 1928, c. 14, paragraph 1, 45 Stat. 54) 2

BLEED THROUGH – POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 645

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, The New York, Chicago and St. Louis Railroad Company submits herewith its statement of particulars disclosing the basis upon which the Supreme Court of the United States has jurisdiction on Appeal to review the judgment of the Supreme Court of Pennsylvania entered in this cause on June 25, 1946. Petition for appeal was filed on September 24th, 1946 and is presented to the Supreme Court of Pennsylvania, to wit, on September 24, 1946.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment entered in this cause is conferred by Section 237 (a) of the Judicial Code, as amended (Jan. 31, 1928 c. 14, Paragraph 1, 45 Stat. 54). The opinion in this cause was handed down by the Supreme Court of Pennsylvania on May 27, 1946, wherein was upheld the validity of a State statute which had been attacked as contrary to the Fourteenth Amendment of the Constitution of the United States. Petition for reargument was filed as required by Rule 86 of the Supreme Court of Pennsylvania, in cases to be appealed to the Supreme Court of the United States, and Order denying the petition was handed down by the Supreme Court of Pennsylvania on June 25, 1946, which is final and complete judgment in this cause by the highest tribunal of the Commonwealth of Pennsylvania. *Kansas City Southern Railway Co.* v. *Road Improvement District No. 3 of Sevier County Arkansas,* 266 U. S. 379; *Miller* v. *Schoene,* 276 U. S. 272; *Citizens Bank of Michigan City* v. *Opperman,* 249 U. S. 449.

Statutes Involved

The sections of the statutes of the Commonwealth of Pennsylvania involved are quoted below. Only the constitutionality of the limitation on the exemption of mutual savings banks is attacked, the limitation and exemption being underscored.

1. Sections 17 and 18 of the Act of the Commonwealth of Pennsylvania, approved June 17, 1913, P. L. 507, as amended by the Act of the Commonwealth of Pennsylvania, approved July 13, 1923, P. L. 1085, as follows:

> "Section 17. All scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds,

BLEED THROUGH – POOR COPY

certificates, and evidences of indebtedness assumed, or on which interest shall be paid, by any and every private corporation, incorporated or created under the laws of this Commonwealth or the laws of any other State or of the United States, and doing business in this Commonwealth, and all scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid, by any county, city, borough, township, school district, or incorporated district of this Commonwealth are hereby made taxable in the year one thousand nine hundred and nineteen, and annually thereafter, for State purposes, at the rate of four mills on each dollar of the nominal value thereof: * * * *And provided, That the provisions of this act shall not apply to building and loan associations, or to savings institutions having no capital stock;* but nothing herein contained shall be construed to relieve or exempt individual depositors in savings institutions having no capital stock from any taxation to which such depositors may be subject; *and if at any time, either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their, or its securities, bonds or other evidences of indebtedness, clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it, or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owing to the said saving institution having no capital stock.* And provided further, That the provisions of this act shall not apply to fire companies, firemen's relief associations, life or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions, or assessments upon

members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock for State purposes, shall not be required to pay any further tax under this section on the mortgages, bonds, and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall be liable for the tax imposed by this section upon all securities so held by them, as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for State purposes shall be taxed or taxable for county, school or other local purposes."

"Section 18. That the tax for State purposes, imposed upon obligations of private and public corporations by section seventeen of this act, shall be collected in the same manner as the tax heretofore imposed for State purposes upon such obligations; it being the true intent and meaning of this act that the provisions of the law in force at the time of the passage of this act, relating to the collection of the State tax upon such obligations, shall remain unaffected by the present act."

2. Act of the Commonwealth of Pennsylvania, approved July 21, 1919, P. L. 1067, amending Section 4 of the Act of the Commonwealth of Pennsylvania, approved June 30, 1885, P. L. 193, as follows:

"Section 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, certificate or evidence of indebtedness, issued by said corporation to residents of this Commonwealth and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt,

BLEED THROUGH – POOR COPY

and to report on oath annually, on or before the last day of February for the calendar year next preceding, to the Auditor General the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct four mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within sixty days after the date of settlement in each year; and his compensation for his services shall be five per centum on the first one thousand dollars or fractional part thereof collected, one per centum of all amounts over one thousand dollars and not over two thousand, and one-half of one percentum of all amounts over two thousand dollars; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; upon payment of said tax by a corporation, the scrip, bonds, certificates, or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same.

In the event of the neglect or refusal of the officers of any such corporation to make the report to the Auditor General, as herein provided, on or before the last day of February in each and every year, or within sixty days of the end of its fiscal year, as hereinafter provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the scrip, bonds, certificates, and evidences of indebtedness of such defaulting corporation and settle an account for taxes, penalty, and interest thereon, from which settlement there shall be no right of appeal. * * *"

3. Sections 18 and 19 of the Act of the Commonwealth of Pennsylvania, approved July 17, 1936, P. L. 51, as follows:

"Section 18. Tax on Scrip, Bonds, Et Cetera; Imposition and Rate of Tax.—All scrip, bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid by any and

every private corporation, incorporated or created under the laws of this Commonwealth or the laws of any other state or of the United States, and doing business in this Commonwealth are hereby made taxable for State purposes during the calendar year one thousand nine hundred thirty-six, on reports filed for the calendar year one thousand nine hundred thirty-five, or for the fiscal year beginning in the calendar year one thousand nine hundred thirty-five, at the rate of one mill on each dollar of the nominal value thereof, and during the calendar year one thousand nine hundred thirty-seven, on reports filed for the calendar year one thousand nine hundred thirty-six, or the fiscal year beginning in the calendar year one thousand nine hundred thirty-six, at the rate of four mills on each dollar of the nominal value thereof, which tax shall be in addition to the tax imposed for State purposes by section seventeen of the act, approved the seventeenth day of June, one thousand nine hundred and thirteen (Pamphlet Laws, five hundred seven), and its amendments or supplements; * * * Provided, That this section shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution or trust company, nor to interest bearing accounts in any bank, banking institution, savings institution or trust company: *And provided further, That the provisions of this act shall not apply to building and loan associations or to savings institutions having no capital stock, and if at any time either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness, clear of and free from the said four mills tax herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them, from paying the said four mills tax on any of the said such securities, bonds or other evidences of indebtedness, as may be held, owned by, or owing to, the said savings institution having no capital stock:* And provided further, That the provisions of this act shall not

BLEED THROUGH – POOR COPY

apply to fire companies, firemen's relief associations, life or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock for State purposes, shall not be required to pay any further tax, under this section, on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall be liable for the tax imposed by this section upon all securities so held by them as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for State purposes shall be taxed or taxable for county, school, or other local purposes. * * *"

Section 19 is similar in wording and effect to Section 18 of the Act of the Commonwealth of Pennsylvania, approved June 17, 1913, P. L. 507, quoted above.

The Issues and the Ruling Below

On February 14, 1941, The New York, Chicago and St. Louis Railroad Company filed with the Court of Common Pleas of Dauphin County, its appeal from the Order of the Board of Finance and Revenue denying petition for review of settlement of the Corporate Loans Tax for the year 1937 in the sum of $40,972.86 on securities issued by the Railroad Company. A number of issues not pertinent to this appeal are raised in the appeal to the Court of Common Pleas of Dauphin County. The issue related to this appeal is contained in Paragraph 5 of the Specifications of Objections

of the appeal to the Dauphin County Court, and complaints of tax settled at the rate of eight mills for one year on $795,500.00 par value of appellant's securities held by mutual savings banks without capital stock incorporated in Pennsylvania, resulting in violation of Section 1, Article IX of the Constitution of the Commonwealth of Pennsylvania requiring uniform taxation, and in arbitrarily and capriciously depriving the appellant of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and impairment of contract in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.[1] The Corporate Loans Tax in Pennsylvania is a tax levied upon bonds and other securities and evidences of debt held by residents of Pennsylvania and issued or the payment assumed by Pennsylvania corporations and by corporations doing business in Pennsylvania. From 1891 until 1935 it was a four mill tax upon the par value of the bonds. In 1935 an Act was approved adding an additional mill, and in 1936 this Act was amended to add four mills instead of one mill, making the total tax eight mills.

The tax is assessed and collected by the Treasurer of the corporation at the time interest is paid. If no interest is paid no tax is assessed or collected. By the decision of the Supreme Court of Pennsylvania in this case the corporation is construed to be the assessor and collector of the tax and this construction is not here questioned.

By the Act of the Commonwealth of Pennsylvania, approved May 1, 1909, P. L. 198, mutual savings banks without capital stock were added to the exempt classes of holders of otherwise taxable securities and evidences of debt with the proviso: "and if at any time, either now or hereafter,

---

[1] Page 11a Printed Record in Supreme Court of Pennsylvania.

BLEED THROUGH – POOR COPY

any persons, individuals or bodies corporate have agreed or shall hereafter agree to issue *his, their or its* securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidences of indebtedness, as may be held, owned by or owing to said savings institution having no capital stock."

This proviso was continued in effect in the Act of the Commonwealth of Pennsylvania of 1913, and its amendments, and in the Act of the Commonwealth of Pennsylvania of 1936 referred to above. The obvious purpose of this proviso was to continue in force the obligation of the corporation issuing the bond to pay the tax which it had agreed to pay for the taxpayer. The holder of the bonds was exempted. The issuer of the bonds continued to pay the holder's tax. "A's" tax was imposed upon "B". The debtor had to pay the creditor's tax from the payment of which the creditor had been excused.

Since however, the Corporate Loans Tax had been and still is uniformly held by the courts of Pennsylvania to be a tax upon property (*Commonwealth of Pennsylvania* v. *Lehigh Valley Railroad Company*, 104 Pa. 89; *Commonwealth* v. *Lehigh Valley Railroad Co.*, 186 Pa. 235, 246, 40 A. 491, 492; *In re Wyoming Valley Ice Co.*, 145 F. 267; *Commonwealth* v. *Jessup & Moore Paper Co.*, 31 Dauph. 273; *Commonwealth* v. *Safe Harbor Water Power Corporation*, 43 Dauph. 415) both the lower court and the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Lehigh Valley R. R. Co.*, 244 Pa. 241, 90 A. 564, did not accept the obvious purpose of the proviso. Instead they held that the tax remained upon the tax-free-covenant bonds in the hands

of mutual savings banks without capital stock in Pennsylvania, while exempting bonds in the hands of mutual savings banks without capital stock, which did not contain such covenant. Thus, the mutual savings banks without capital stock held two classes of bonds, one taxable and the other not taxable. The obligation of the corporation to pay the tax referred to in the proviso, was its obligation as collector of the tax for the Commonwealth, and not the obligation imposed by its covenant. The covenant merely tagged the bond for classification. Since the tax remained on the bond, the covenant to pay the tax was kept active.

Certain corporations in their covenants limited the amount of tax they would pay to four mills, while other corporations placed no limit on the amount of Corporate Loans Tax they would pay on behalf of the holder of the bonds. When the Act of 1936 was passed adding four mills to the four mills already imposed, the Commonwealth, under the construction placed upon the Act by the Supreme Court of Pennsylvania requiring the corporations which agreed to pay only four mills of such tax to collect the additional four mills from the mutual savings banks without capital stock, should have collected the additional tax on bonds with tax-free covenants. This the Commonwealth refused to do and limited the payment of the tax on such bonds to the four mills which the corporations had agreed to pay.[1a]

Because the appellant had a covenant to pay whatever tax might be imposed, the Court of Common Pleas of Dauphin County in the instant case sustained in full the eight mills of tax imposed on $795,500.00 of appellant's securities held by mutual savings banks without capital stock containing tax-free-covenant clauses. It dismissed the attack on the constitutional validity of the proviso imposing the tax, by the simple statement that it was in

---

[1a] Page 45a Printed Record in Supreme Court of Pennsylvania.

BLEED THROUGH – POOR COPY

the power of the Commonwealth to impose the tax, citing the case of *Commonwealth* v. *School District of Pittsburgh*, 343 Pa. 394, which had upheld the authority of the earlier case of *Commonwealth* v. *Lehigh Valley R. R. Co., supra.*[2]

The appellant took an exception to this conclusion of the Court of Common Pleas of Dauphin County as follows:

> "9. The learned trial judge erred in failing to conclude that the imposition of liability upon the defendant to pay over the corporate loans tax involved in this case unconstitutionally deprived the defendant of its property without due process of law and denied to it the equal protection of the law."[3]

The appellant also took exception to the finding of the trial judge that the defendant was liable for the tax on its tax-free covenant bonds held by Pennsylvania mutual savings institutions having no capital stock. The court overruled the exceptions.[4]

The overruling of the exceptions was assigned as error in an appeal taken to the Supreme Court of Pennsylvania.[5] It sustained the judgment of the Court of Common Pleas of Dauphin County in the matter involved in this appeal as well as on other points. In the matter of the constitutional validity of continuing the tax on tax-free-covenant bonds of the appellant held by mutual savings banks without capital stock, it contented itself with referring to the two cases in which the point had already been settled—*Commonwealth* v. *Lehigh Valley R. R. Co., Supra,* and *Commonwealth* v. *Pittsburgh School District, supra.*

---

[2] Page 234a Printed Record in Supreme Court of Pennsylvania.

[3] Page 242a Printed Record in Supreme Court of Pennsylvania.

[4] Page 244a Printed Record in Supreme Court of Pennsylvania.

[5] Pages 13 and 15 Printed Brief for Appellant in Supreme Court of Pennsylvania.

It is the contention of The New York, Chicago and St. Louis Railroad Company that:

1. The continuing in force of the obligation of the appellant below under the tax-free covenant clauses in bonds held by mutual savings banks without capital stock compels appellant below to pay a tax on property not owned by it but owned and held by mutual savings banks without capital stock, thereby depriving appellant below of its property without due process of law and denying to it the equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

2. The construction of the proviso of the taxing statute by the Supreme Court of Pennsylvania whereby bonds, securities and other evidences of debt held by mutual savings banks without capital stock are placed in two classes—those containing no tax-free-covenant clauses and those containing tax-free covenant clauses—is arbitrary and capricious classification in that while non-tax-free-covenant bonds in the hands of mutual savings banks without capital stock are exempt from tax, tax-free-covenant bonds continue to be subject to the tax solely for the purpose of keeping active for the benefit of the Commonwealth, a covenant which existed only for the benefit of the holder of the bonds. The appellant below is thereby denied the equal protection of the law and deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

The Questions Are Substantial

The questions submitted in this appeal are substantial and important. Aside from the amount of tax at stake, which is considerable, there is the principle involved of whether or not a state may arbitrarily use the power of

BLEED THROUGH – POOR COPY

classification of property solely for the purpose of nullifying a right under the Federal Constitution.

In this case the Legislature of Pennsylvania exempted from the corporate loans tax of that state corporate bonds held by mutual savings banks without capital stock located in the state. Quite a number of classes of holders of bonds exempt from the tax had been established, and no exception is taken to classifying these banks for purposes of tax exemption. They are founded to enable people of few means to secure a better return on their savings than is elsewhere available while retaining all the usual safeguards. They have many cooperative features. They are an object of special regard of the state.

The objection of the appellant comes when the state taxes corporate bonds with tax-free-covenant clauses in the hands of these tax exempt mutual savings banks without capital stock and imposes the tax on the issuer of the bonds. The covenant of the issuing corporation had become dormant. To compel the covenantor now to pay the tax was compelling it to do more than it had agreed to do.

On its face, this imposes a property tax on property not owned. The property, corporate bonds, are owned by the mutual savings banks. The tax is paid by the issuing corporation, a party who has no title to the bonds. The Legislature apparently had seized upon the fact that the obligor of the bonds had some relationship to them and thereby attempted to impose the tax upon it. But the obligor has no property interest in its own obligations. The obligee owns the obligations. The dangerous doctrine is established that the State may impose upon the debtor a tax properly due and owing by the creditor, but no similar attempt has been made by any other state or by the Federal Government so far as can be found.

It has been settled that the State cannot tax "B" for the property owned by "A" *Schlessinger* v. *State of Wisconsin*, 270 U. S. 230; *Hoeper* v. *Tax Commission*, 284 U. S. 206; *Heiner* v. *Donnan*, 285 U. S. 312.

The dissent in the cases just cited did not in any way attempt to deny the rule that the State could not collect taxes against "B" on property owned by "A". That proposition has never been doubted.

The Pennsylvania Supreme Court has tried to get around this unconstitutional taking of property, by construing the taxing Act to set up two classes of bonds in the portfolios of the mutual savings banks without capital stock, those without tax-free covenants being exempt and those with tax-free covenants being subject to the tax. Mark you, the tax-free-covenant bonds are taxed in the hands of and as the property of the mutual savings banks under this construction. This keeps alive the covenant of the issuer of the bonds in the eyes of the Pennsylvania courts. The issuer being bound, must pay the tax. Thus is avoided the embarrassment of saying that "B" is being taxed for property of "A". A borrower, foolishly or otherwise, in order to secure funds, promises the lender to pay any taxes that are levied on the obligation. The state exempts the lender from paying tax, except tax on obligations which the debtor has agreed to pay. Such obligations in his hands are classified by the agreement to pay the tax in order to keep alive the agreement to pay the tax.

It is insisted that "B" is still being taxed for property of "A", despite the construction of the Supreme Court of Pennsylvania. While the Supreme Court of the United States considers itself concluded by the ordinary construction of a statute by the state court of last resort, in a question of whether a tax statute deprives a party of rights secured by the Federal Constitution, it does not look to the

BLEED THROUGH – POOR COPY

form in which the taxing scheme is cast nor to the characterization of that scheme as adopted by the state court. The operation and effect of the tax, the substance and not the form is considered. *St. Louis Southwestern Railway Company* v. *Arkansas ex rel Norwood,* 235 U. S. 350, 362, 363; *Senior* v. *Braden,* 295 U. S. 422, 429; *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania,* 296 U. S. 113, 119.

When the Commonwealth of Pennsylvania raised the corporate loans tax from four mills to eight mills it did not, in the case of an issuer of bonds who had agreed to pay only four mills of tax for the holder, collect the additional four mills from the mutual savings bank without capital stock which held the bonds. This it should have done under the ruling of the Pennsylvania courts. It disregarded the ruling and contented itself with collecting only four mills from the issuer of the bonds, itself.

It is respectfully submitted that real and substantial questions are presented in this case.

ROBERT M. FISHER,
JOHN Y. SCOTT,
Counsel for The New York, Chicago. and St. Louis Railroad Company.

This 24th day of September, 1946.

APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Nos. 13 and 14 May Term, 1946

COMMONWEALTH OF PENNSYLVANIA

v.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, *Appellant*

Appeals from the Orders of the Court of Common Pleas of Dauphin County at No. 200 Commonwealth Docket, 1941 and No. 92 Commonwealth Docket, 1944

OPINION OF THE COURT—Filed May 27, 1946

HORACE STERN, *J.:*

The questions involved in these cases have been considered at length in *Appeal of Fidelity-Philadelphia Trust Company*, 354 Pa. 358, 47 A. 2d 272. The New York, Chicago & St. Louis Railroad Company appeals from assessments of the corporate loans tax imposed upon it for the years 1937 and 1941. This company is the offspring of three successive consolidations: The first between the New York, Chicago and St. Louis Railroad Company (a New York corporation) and a Pennsylvania corporation, the second between the consolidated New York, Chicago & St. Louis Railroad Company, an Ohio corporation and an Indiana corporation; the third between the twice previously consolidated New York, Chicago & St. Louis Railroad Company, two Illinois and two Indiana corporations. Some of the bonds here in question were issued by the present corporation, others by either the first or the second consolidated company. The corporation does not have any fiscal officer resident within this Commonwealth and the interest on the bonds is paid from an office outside the State.

For the reasons stated in the *Fidelity-Philadelphia Trust Company* case we are of opinion that appellant is to be

BLEED THROUGH – POOR COPY

regarded as a domestic corporation and that therefore its liability for the corporate loans tax is not affected by the fact that it does not have a treasurer resident within the Commonwealth.

Some of appellant's bonds are held by Pennsylvania savings institutions having no capital stock, but they contain covenants that the interest will be paid without any deduction for taxes. The Act of May 10, 1937, P. L. 633, section 3, while providing that the personal property tax is not applicable to such savings institutions, further provides that if a corporation has agreed to issue its bonds free from the tax it is not relieved from paying the tax on its bonds held or owned by such an institution—a provision which harks back to the Act of May 1, 1909, P. L. 296. Appellant contends that this constitutes an unconstitutional discrimination between bonds containing and those not containing a tax-free covenant, but provisions of this type were considered and upheld in *Commonwealth* v. *Lehigh Valley R. R. Co.*, 244 Pa. 241, 90 A. 564, and *Commonwealth* v. *Pittsburgh School District*, 343 Pa. 394, 23 A. 2d 496.

Judgment affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

Appeal No. 32, reported at page 241 of Volume 244 of the Pennsylvania State Reports

COMMONWEALTH

v.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*

Appeal from tax settlement. Tried by the court without a jury. Kunkel, P. J., filed the following opinion:

This is an appeal from the settlement of an account against the defendant company for tax on its loans for the year 1910. The case has been submitted to the court to be

tried without a jury agreeably to the provisions of the Act of April 22, 1874, P. L. 109. There being no dispute respecting the facts, we find them to be as set forth in the defendant's requests for findings of fact filed herewith. Summarized they are as follows:

Facts

On July 25, 1911, the account appealed from was settled against the defendant company for tax on its loans for the year 1910, in which account it was charged with a tax on $53,617,000 of indebtedness. The tax, after the allowance of commissions, amounted to $204,957.81, of which amount the defendant paid $180,000 and took this appeal from the balance of the account. The $53,617,000 of indebtedness taxed included bonds and notes held by savings institutions of this State having no capital stock to the amount of $4,598,000. These securities contained an agreement on the part of the defendant company that the interest thereon should be paid without deduction for any tax of any state, which the defendant company might be required to pay or to retain therefrom under present or future laws, and some of the securities contained an agreement in so many words that the defendant would pay the tax. The defendant contends that the indebtedness owned and held by savings institutions of this State having no capital stock is not subject to tax by virtue of the exemption contained in Proviso 2 of the Act of May 1, 1909, P. L. 298.

Discussion

The questions presented by this appeal relate to the validity and construction of Provisos 2 and 4 of the Act of May 1, 1909, P. L. 298. The act itself is an amendment of the tax legislation contained in the Act of June 1, 1889, P. L. 420, as amended by the Act of June 8, 1891, P. L. 229, and purports to relieve and exempt savings institutions having no capital stock from the loans tax therein provided. It is a reenactment of the first section of the Act of June 8, 1891, and imposes an annual tax of four mills on corporate bonds or securities held, owned or possessed by corporations of this State or any other State, but de-

BLEED THROUGH – POOR COPY

clares by Proviso 2, "That the provisions of this act shall not apply to building and loan associations or to savings institutions having no capital stock"; and by Proviso 4, "That if at any time, either now or hereafter, any persons, individuals or bodies corporate, have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness clear of and free from the said four mills tax, herein provided for, or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them from paying the said four mills tax on any of the said such securities, bonds, or other evidence of indebtedness as may be held, owned by or owing to the said saving institution having no capital stock." It is manifest that the two provisos must be construed together; for Proviso 4 directs that "nothing herein contained shall be so construed as to relieve or exempt * * * from paying the said four mills tax," etc. It thus expressly refers to Proviso 2, which grants the exemption, and plainly places a limitation on its construction and scope.

To understand the legislative intention expressed by the provisos, they must be construed in the light of the law as it stood at the time they were enacted. At that time corporate securities held and owned by savings institutions having no capital stock were taxable annually at the rate of four mills, and such tax was required to be collected by the corporation issuing the securities. The Act of June 30, 1885, P. L. 193, imposed upon the corporation the duty to deduct the tax from the interest on its indebtedness when it paid the same and to return and pay the tax into the State treasury. If it wilfully failed or neglected to perform the duty, it itself became liable for the tax: Com. *v.* Del. Div. Canal Co., 123 Pa. 594; Com. *v.* Lehigh Valley R. R. Co., 129 Pa. 429; Com. *v.* Philadelphia & Reading R. R. Co., 150 Pa. 312; Com. *v.* Lehigh Valley R. R. Co., 185 Pa. 235. Proviso 2 of the Act of May 1, 1909, relieves and exempts savings institutions having no capital stock from the tax, but in Proviso 4 the legislature recognizes the fact that such savings institutions may hold or own corporate securities containing an agreement on the part of the corporation

issuing them to pay the tax, and therefore it provides that in such case the corporation shall not be exempt from the duty of returning and paying the tax as theretofore required by law. The relief or exemption which Proviso 2 was intended to afford was for the benefit of the savings institutions and not for the benefit of the corporation issuing the securities. Legislative relief or exemption was intended to be afforded where such relief or exemption was necessary, and not where, because the debtor corporation had assumed the payment of the tax or had issued its securities clear of or free from the tax, no relief was needed. It is quite clear to us, that although Proviso 4 is awkwardly constructed, it intended to preserve the tax on corporate securities owned or held by savings institutions which had no capital stock, where in and by the securities themselves the institutions were already relieved, and needed no legislative exemption. The legislative intention to retain the tax is apparent, although it has been expressed by an indirect rather than by a direct declaration to that effect.

The contention of the defendant company that a tax is imposed by Proviso 4 on the corporation issuing the securities is untenable. The proviso does not impose any tax on corporate securities, but directs that the corporation shall not be relieved or exempt from paying the tax which it theretofore was required to deduct from the interest paid on its securities. The effect of the language used is to continue the tax on such securities, even though owned and held by savings institutions having no capital stock. Proviso 4, as we have said, appears to be an indirect way of declaring that the tax shall remain on the securities so held. A reference to the Act of June 30, 1885, P. L. 193, will show that Proviso 4, when it declares that "nothing herein contained shall be so construed as to relieve or exempt" the corporation issuing the securities "from paying" the four mills tax on the securities held, owned by or owing to the savings institution having no capital stock, is but a recognition of the former's requirements with respect to paying, which are as follows: "It shall be his further duty (the duty of the treasurer of the corporation issuing the securities) to deduct three

BLEED THROUGH – POOR COPY

mills (now four mills; Act of June 8, 1891, P. L. 229; Com. *v.* Wilkes-Barre and Scranton Ry. Co., 162 Pa. 614), on every dollar of the interest paid as aforesaid and return the same into the state treasury," and again "for every failure to assess and pay said tax," and further "on payment of said tax." It thus clearly appears that the tax which the corporation is not to be relieved of by Proviso 4 from paying is the tax which it is its duty to collect and pay under the Act of 1885. The proviso declares it shall not be relieved of that duty, and if not relieved, it must be because the tax on the securities issued free and clear of tax is retained. The result of the views thus expressed is to obey the mandate in the proviso as to the construction of the Act, and to relieve from the tax only such corporate securities owned by savings institutions having no capital stock as have been issued without any stipulation for the payment of the tax by the debtor corporations.

What we have said we think disposes of the defendant's contention that Proviso 4 is void, because no notice thereof is given in the title. If the interpretation we have adopted is the correct one, the title is wider in scope than the provisos. It purports to relieve and exempt wholly from the provisions of the act savings institutions having no capital stock, whereas the construction we have placed on Proviso 4 restricts the exemption in Proviso 2 to such corporate securities owned and held by them as have not been issued free and clear of the tax.

It also disposes of the defendant's objection that Proviso 4 attempts to enforce the contract between it and the owners of its securities. The liability of the defendant for the tax does not arise out of the contract, but out of the legislation which imposes the tax and which requires the defendant to collect and pay. The exemption from the tax is modified by the proviso as respects the one kind of securities; as to the other kind only, the exemption remains. The language of the proviso is descriptive merely of the kind which shall not receive the exemption.

The constitutionality of Proviso 2 seems to be conceded; and it is not disputed that there is a recognized difference between corporate securities relieved by agree-

ment of the parties from tax and those in which there is no agreement for relief.

The classification is not an arbitrary one, but one which actually exists in the business world. If the power exists to relieve savings institutions as a class from the tax on all their corporate securities, we cannot see how it may not be exercised so as to relieve them from the tax on some of their corporate securities, all members of the class being treated alike.

It appears in the case before us that the indebtedness on which the tax is sought to be recovered was issued by the defendant company free and clear of tax, it being provided in and by the securities that the interest should be paid without deduction for State tax. This stipulation in its usual and popular sense means that the securities should be free of tax so far as the holders or owners thereof were concerned. In four classes of obligations the defendant agreed to pay the State tax to which its securities were or might be subjected. Among the owners of the securities, to the amount of $4,598,000, were several savings institutions of this State having no capital stock. The tax on this latter amount the defendant failed to deduct from the interest which it paid thereon for the year for which this settlement was made.

Conclusions of Law

Applying the views we have expressed as to the construction and validity of the provisos to the Act of May 1, 1909, we conclude:

1. That the indebtedness of $4,598,000, issued free and clear of tax and owned by savings institutions having no capital stock, is subject to the loans tax and is not relieved or exempted therefrom by Proviso 2 of the Act of May 1, 1909.

2. That the defendant company, having failed to deduct the tax thereon when it paid the interest, is liable therefor.

BLEED THROUGH – POOR COPY

3. That the Commonwealth is entitled to recover as follows:

Indebtedness		$53,617,000.00
Tax, less commission,	$	204,957.81
Less tax on bonds held by Harrisburg Trust Company and Mauch Chunk Heat, Power and Electric Company, $26,000		104.00
	$	204,853.81
Less amount paid,		180,000.00
	$	24,853.81
Interest from Sept. 25, 1911		2,363.15
Attorney General's commission		1,360.84
Total amount due	$	28,577.80

Accordingly we direct judgment to be entered in favor of the Commonwealth and against the defendant for the sum of $28,577.80, unless exceptions be filed within the time limited by law.

Errors assigned were in dismissing exceptions to the opinion of the court.

A. C. Stamm, with him *John G. Johnson*, for appellant.

William M. Hargest, Second Deputy Attorney General, with him *John C. Bell, Attorney General*, for appellee.

Per Curiam, February 16, 1914:

The judgment is affirmed on the opinion of the learned president judge of the Common Pleas.

APPENDIX "C"

COMMONWEALTH

v.

PITTSBURGH SCHOOL DISTRICT, *Appellant*

Supreme Court of Pennsylvania, January 5, 1942: Reported at 343 Pa. 394, 23 A2d 496.

The question presented on this appeal by the School District of the City of Pittsburgh is whether it is liable for the four mill State tax on bonds which it has issued, containing a tax free covenant, held by (1) savings institutions having no capital stock and (2) by resident corporate trustees under trusts for non-resident beneficiaries. The court below held the School District liable for the tax.

The statute imposing the tax is the Act of June 17, 1913, P. L. 507, as amended. Section 17, 72 PS §2121, provides:

"* * * all bonds * * * on which interest shall be paid, by any * * * school district * * * are hereby made taxable * * * annually * * * for State purposes at the rate of four mills on each dollar of nominal value thereof * * * the provisions of this act shall not apply to * * * savings institutions having no capital stock * * * and if at any time * * * any * * * bodies corporate have agreed or shall hereafter agree to issue * * * bonds * * * clear of and free from the said four mills tax * * * or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt * * * it * * * from paying the said four mills tax on any of said * * * bonds * * * as may be held, owned by, or owing to the said savings institution having no capital stock."

It is argued in behalf of the School District that it does not come within the designation, "bodies corporate," appearing in the act, who are required to pay the tax, even though the bonds are held by savings institutions in instances where the bonds are issued with tax free covenants. We are unable to accept the argument, because in our opinion

BLEED THROUGH – POOR COPY

school districts are "bodies corporate" and have been so recognized by express legislative provisions.

Article I, section 101, of the School Code (Act of May 18, 1911, P. L. 309, as amended, 24 PS §21 et seq.) makes each city a separate school district. Section 123, 24 PS §34, confers upon each district the right to sue and be sued "in its corporate name." Section 124, 24 PS §35, gives the power to the school directors to adopt a "corporate seal." And Section 119, 24 PS §30, is in this convincing language: "The several school districts in this Commonwealth, established by this act, shall be and hereby are vested, *as bodies corporate* with all necessary powers to enable them to carry out the provisions of this act." The lawmaking body having in explicit terms declared them to be "bodies corporate," we must and do so recognize them. Furthermore, as long ago as 1862, in *Wharton* v. *School Directors of Cass Township*, 42 Pa. 358, 363, we said: "They belong to that class of quasi corporations to which counties and townships belong," and in *Erie School District* v. *Fuess*, 98 Pa. 600, 606, we said, they "are corporations of lower grade and less power than a city." See also *Mulligan* v. *School District*, 241 Pa. 204, 88 A. 362. Recently, in *Wilson* v. *Phila. School Dist.*, 328 Pa. 225, 249, 195 A. 90, we spoke of the power of the School District "to borrow money for its proper corporate purposes." *Com.* v. *Beamish*, 81 Pa. 389, is not authority against our present conclusion. We were there dealing with a penal statute which required strict construction. We remarked, however, that legislation has conferred on school district certain capacities as "bodies corporate."

As to the bonds held by the resident trustee in trust for non-resident beneficiaries, it is sufficient to say that under all our decisions property held in trust is assessable to the trustee where the trust is administered. The payment of taxes on trust property is an obligation of the trustee: *Guthrie* v. *Pittsburgh, Cincinnati & St. Louis Ry.*, 158 Pa. 433, 27 A. 1052; *Cumberland Co.* v. *Lemoyne Trust Co.*, 318 Pa. 85, 178 A. 32; *Dorrance's Est.*, 333 Pa. 162, 3 A. 2d 682; *Griscom's Est.*, 333 Pa. 186, 3 A. 2d 693.

It is suggested in appellant's brief that if we reach the conclusion which we have, that the taxes are payable by the

School District, the act warranting the levy must be considered discriminatory and in violation of the constitutional provision against unreasonable classification, citing *Com.* v. *Quaker City Cab Co.*, 287 Pa. 161, 134 A. 404; *Com.* v. *Girard Life Ins. Co.*, 305 Pa. 558, 158 A. 262. We think neither of these cases supports the contention and that there is no arbitrary classification made. In *Com.* v. *Hudson Coal Co.*, 287 Pa. 64, 134 A. 413, we said that the matter of classification is one for the Legislature and not for the courts and that it is not for us to interfere, unless we can say that the grouping made by that body is purely illusory and clearly intended as an evasion of the Constitution. The same idea, in other language, is expressed in the *Girard Life Ins. Co.* case and in *Com.* v. *Delaware Division Canal Co.*, 123 Pa. 594, 16 A. 584; *Com.* v. *Germania Brewing Co.*, 145 Pa. 83, 86, 22 A. 240, and in the *Quaker City Cab Co.* case.

The judgment of the court below is affirmed.

APPENDIX "D"

Appeal of FIDELITY-PHILADELPHIA TRUST CO.

Supreme Court of Pennsylvania, May 27, 1946

Reported at 354 Pa. 355, 47 A. 2d 267

HORACE STERN, *Justice:*

The question is: Are the bonds issued by a foreign railroad corporation which thereafter became a component part of an interstate consolidated railroad company pursuant to a consolidation agreement filed in Pennsylvania and in other states, subject to the state personal property tax in the hands of residents of Pennsylvania, if the consolidated company assumed the obligation to pay the interest on such bonds but its treasurer is not a resident of this State?

The appeal in the court below was from the assessment of such a tax for the year 1939 imposed upon the Fidelity-Philadelphia Trust Company as trustee, guardian or execu-

BLEED THROUGH – POOR COPY

tor for sundry trusts, wards or estates holding bonds of the Western Maryland Railroad Company, the New York Central Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Delaware, Lackawanna & Western Railroad Company. The first three of these railroads are companies created, as far as Pennsylvania is concerned, by a consolidation under the act of March 24, 1865, P. L. 49, 67 P. S. § 599 et seq., and each of them assumed liability on bonds which had been issued by a component company incorporated under the laws of a state other than Pennsylvania. None of the four has a treasurer who maintains his office in this Commonwealth, nor is the interest on their bonds paid from any office in this State. The court sustained the appeal and struck off the assessment; from that action the Commonwealth now appeals to this court. The City of Philadelphia, the County of Allegheny, the Western Maryland Railroad Company, and several trust companies in Philadelphia, have filed briefs as amici curiae.

Our first inquiry must be directed to the domiciliary status of a company formed by the consolidation of railroad companies incorporated under the laws of Pennsylvania and of other states. The Act of March 24, 1865, P. L. 49, section 3, provides that upon such consolidation the several corporations, parties thereto, shall be deemed and taken to be one corporation, possessing within this Commonwealth all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties, of each of the corporations so consolidated. Many perplexing questions have arisen as to the legal nature of such a consolidated corporation and its status in each of the states where one of its component parts had been incorporated; the views taken by the various jurisdictions in regard to such problems are far from harmonious. The prevailing doctrine, however, is that a corporation organized by consolidation of corporations incorporated under the laws of several states is to be viewed as a domestic corporation in each of the states which authorized its existence and is subject to the laws of such state so far as its powers and liabilities therein are concerned. See cases cited in 51 C. J. 784, 785, § 566, notes 4

and 5; in 44 Am. Jur. 548, § 324, note 15; and in Fletcher, Cyc. Corp., Vol. 15, p| 292, ch. 61, § 7189, note 66.

The present assessment of tax on the Fidelity-Philadelphia Trust Company, as fiduciary, was made in pursuance of the Act of June 22, 1935, P. L. 414, as reenacted and amended by the Act of May 18, 1937, P. L. 633, 72 P. S. § 3242 et seq. By section 3 of the latter act all personal property of the classes therein enumerated, including all loans issued by any corporation created under the laws of this Commonwealth or of any other state, owned, held or possessed by any resident, except such loans as are made taxable for state purposes by section 17 of the act, are made taxable, annually, for state purposes, at the rate of four mills on each dollar of the value thereof. By section 17 all bonds issued, assumed or on which interest is paid by any corporation incorporated under the laws of this Commonwealth, or the laws of any other state and doing business in this Commonwealth and having a resident corporate treasurer therein, are made taxable for state purposes at the rate of eight mills on each dollar of the nominal value thereof. The act thus maintained the differentiation, established by the Act of June 17, 1913, P. L. 507, 72 P. S. § 4821 et seq., between the personal property tax and the corporate loans tax; the former is payable by the holder of the bond, annually, and is based upon the value of the bond, whereas the latter is retained by the corporation when making payments of interest on the bond and is based upon its face amount or nominal value. Neither is imposed upon the corporate obligor but both upon the holder of the bond, the corporation being merely the collector of the tax on the corporate loan: Commonwealth *v.* Lehigh Valley R. R. Co., 104 Pa. 89, 99; Commonwealth *v.* Lehigh Valley R. Co., 186 Pa. 235, 246, 40 A. 491, 492; Commonwealth ex rel. Baldrige *v.* Sun Oil Co., 294 Pa. 99, 102, 143 A. 495, 496, 60 A. L. R. 737. The personal property tax and the corporate loans tax are mutually exclusive; if the bond is one on which a corporate loans tax must be deducted from the interest and paid by the corpora-

BLEED THROUGH – POOR COPY

tion the holder of the bond need not pay thereon any personal property tax; if, on the other hand, the bond is one on which the corporation is not required to collect and pay the corporate loans tax it is subject to the personal property tax in the hands of the owner: In re Alison's Estate, 338 Pa. 194, 12 A. 2d 920. The Act of 1937 thus provides in effect for two classes of corporate obligations—those subject in the hands of the owners to the state personal property tax, consisting of such corporate loans as are not made taxable for state purposes under section 17, and those subject to the corporate loans tax, consisting of (1) bonds of domestic corporations and (2) bonds of foreign corporations doing business in this Commonwealth and having a resident corporate treasurer therein. When the history of this tax legislation is studied the scheme which it establishes is readily comprehended. It aims to have a tax collected on every bond owned, held or possessed by a resident of Pennsylvania, but the obligation to accomplish that collection is placed, whenever constitutionally permissible, upon the corporation itself, for obviously it is more desirable to collect the tax in a lump sum from the corporation issuing the bonds or assuming payment of the interest thereon than from a multitude of individual and frequently unknown owners. The Supreme Court of the United States decided, however, in New York, Lake Erie and Western R. R. Co. *v.* Pennsylvania, 153 U. S. 628, 14 S. Ct. 952, 38 L. Ed. 846, and Delaware & Hudson Canal Co. *v.* Pennsylvania, 156 U. S. 200, 15 S. Ct. 358, 39 L. Ed. 396, that Pennsylvania could not impose the duty of assessing and collecting a tax on bonds held by residents of Pennsylvania upon foreign corporations making payments of interest from an office maintained in another state; it was held that Pennsylvania has no jurisdiction over a foreign corporation, even if doing business in this Commonwealth, so far as its activities in another state are concerned. Although this ruling was recognized as controlling and was therefore followed by this court in Commonwealth *v.* Barrett Manufacturing Co., 246 Pa. 301, 92 A. 302, it may be said parenthetically that

those decisions of the United States Supreme Court have been greatly weakened, if not wholly overridden, by subsequent cases in that court, notably Travis *v.* Yale & Towne Manufacturing Co., 252 U. S. 60, 40 S. Ct., 228, 64 L. Ed. 460; Monamotor Oil Co. *v.* Johnson, 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141; Felt & Tarrant Manufacturing Co. *v.* Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488; McGoldrick *v.* Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Nelson *v.* Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888, 132 A. L. R. 475; and International Harvester Co. *v.* Wisconsin Department of Taxation, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373; in each of those cases statutes were upheld under which a duty of collecting taxes would fall upon non-resident officials of foreign corporations. However, the Pennsylvania legislature, apparently with the earlier cases in mind chose to provide in section 17 of the Act of 1937 that the corporate loans tax, while applicable to all domestic corporations, should be applicable only to such foreign corporations as had a treasurer resident in this State.

The present controversy involves bonds issued or assumed by domestic corporations whose treasurer- are not resident in Pennsylvania. The question arises by reason of the fact that while, as just stated, section 17 of the Act of 1937 imposes the corporate loans tax upon all domestic corporations, section 18 provides that it shall be the duty of the *resident* treasurer of each corporation incorporated under the laws of this Commonwealth or the laws of any other state, and doing business in this Commonwealth, to assess the corporate loans tax imposed for state purposes by section 17 of the act and to deduct the tax imposed by that section on the payment of any interest and return it to the State Treasury. It is the contention of the railroad corporations, therefore, that the duty in regard to the collection of the corporate loans tax is thus imposed only upon treasurers resident in Pennsylvania, that, as they have no such resident treasurer, there is no obligation on their part to deduct and pay the corporate loans tax, and that consequently their bonds, although apparently embraced in the class enumerated in section 17, must be

BLEED THROUGH – POOR COPY

relegated to section 3 as subject to the personal property tax in the hands of the individual owners. While it must be admitted that that contention would gain support if the phraseology of section 18 were to be given a wholly literal interpretation, its persuasive force fails when resort is had to an analysis of the successive tax statutes and the construction placed upon them by this court, for it then clearly appears that the use of the word "resident" in section 18 was not intended to transfer the bonds of domestic corporations whose fiscal officers happen to exercise their functions in states other than Pennsylvania from the class which, under section 17, are subject to the corporate loans tax to the class which, under section 3, are subject to the personal property tax. That Pennsylvania has the constitutional *right* to impose on non-resident treasurers the duty of deducting the tax due by residents of Pennsylvania would seem to be beyond question, for to say that a domestic corporation, existing as it does only by the authority given it by the State, can, by the simple expedient of having its treasurer maintain his office outside the State, escape what is essentially nothing more than an administrative duty imposed upon it by the laws of the State, would be to propound an obviously untenable proposition. Even if, therefore, the New York, Lake Erie & Western R. R. Co., Delaware & Hudson Canal Co., and Barrett Manufacturing Co. cases are still to be recognized as authorities in regard to the power of Pennsylvania over *foreign* corporations maintaining offices outside the State, there can be no question but that the duty imposed by the Act of 1937 upon treasurers to deduct the corporate loans tax may be made applicable to the treasurers of *domestic* corporations whether resident within or without the State. Nor is there any doubt but that the legislature has consistently shown its intention of exercising such power, for the legislation all indicates that the corporate loans tax is to have the broadest possible scope, and that, wherever it can legally be imposed, it is to be given preference to the personal property tax. The Act of 1937, section 17, like the Act of July 15, 1919, P. L. 955, 72 P. S. 2121, expressly provides that only such bonds as cannot be made subject to the corporate loans tax under that section shall

be taxed under the personal property tax imposed by section 3. See In re Alison's Estate, 338 Pa. 194, 196, 197, 12 A. 2d 920, 921, 922.

It is to be borne in mind that the duty of collecting the corporate loans tax is not placed by the statutes upon the treasurer in his individual but only in his official capacity as an officer of the corporation. Commonwealth ex rel. Baldrige *v.* Sun Oil Co., 294 Pa. 99, 106, 143 A. 495, 497, 60 A. L. R. 737. It is upon the corporate entity that the obligation rests, and the reference to a treasurer in the Act of 1937, as in the various preceding acts, is merely incidental and directory. In the Act of April 30, 1864, P. L. 218, section 3, the duty of retaining the tax upon payment of the interest was imposed upon "every president, treasurer, cashier, or other officer" of the corporation. In the Acts of June 7, 1879, P. L. 112, section 17, and June 10, 1881, P. L. 99, section 2, that duty was placed upon the *corporation*. By the Act of June 30, 1885, P. L. 193, section 4, 72 P. S. 2162, the treasurer was given the duty of assessing and deducting the tax upon payment of interest on the bonds. The Act of June 1, 1889, P. L. 420, section 2, speaks of the corporate loans tax required to be paid into the state treasury by the *corporation*. In the Act of July 15, 1919, P. L. 954, 72 P. S. §§ 2142, 2143, the duty to deduct the tax from interest due and payable for prior years was to be that of the treasurer or *other* fiscal officer of the corporation. While the Act of July 21, 1919, P. L. 1067, 72 P. S. § 2162, provided that it should be the duty of the *treasurer* of the corporation to assess and deduct the tax, it further stated that "in the event of the neglect or refusal of the *officers* of any such corporation" to report the amount of the corporate indebtedness owned by residents of this Commonwealth it should be the duty of the Auditor General and State Treasurer to estimate a valuation of the indebtedness of "such defaulting *corporation*" and to settle an account for taxes thereon. In the Act of May 18, 1937, P. L. 633, section 18, for the first time the qualifying adjective "resident" was applied to the word "treasurer," but it is significant that when, in that same session of the legislature, section 708 of the Fiscal Code of April 9, 1929, P. L. 343, was amended by the Act of

BLEED THROUGH – POOR COPY

February 2, 1937, P. L. 3, 72 P. S. § 708, it imposed the duty of collection of the tax upon the treasurer of the corporation without providing any limitation as to his residence. It is important also to note that section 17 of the Act of 1937 speaks of the *corporation*, under certain prescribed conditions, being relieved of the duty of deducting and paying the tax for a certain part of the year; this provision followed a similar one in the Act of July 13, 1923, P. L. 1085, 72 P. S. § 2121. Thus from the general purport of all this legislation, it is clear that it was the *corporation* which was regarded as the agent obligated to report to the Commonwealth its bonded indebtedness and to deduct the corporate loans tax in making payments of interest thereon, and that the provision as to the particular officer who should attend to the duty thus imposed was merely casual and not intended to absolve the corporation whose bonds were subject to the corporate loans tax from the duty of withholding the interest and paying it into the treasury of the State. This is borne out, too, by an extremely long line of judicial decisions, for it has been uniformly held that where the particular designated official fails to perform the prescribed duty the corporation must perform it by one of its other officers or agents acting on its behalf: Commonwealth *v.* Delaware Division Canal Co., 123 Pa. 594, 618, 16 A. 584, 587, 2 L. R. A. 798; Commonwealth *v.* Lehigh Valley R. Co., 129 Pa. 429, 449, 450, 18 A. 406, 408, 410; Commonwealth *v.* Philadelphia & Reading Coal & Iron Co. 137 Pa. 481, 493, 20 A. 531, 580; Commonwealth *v.* Pennsylvania Salt Manufacturing Co., 145 Pa. 53, 55, 22 A. 215, 216; Commonwealth *v.* Delaware & Hudson Canal Co., 150 Pa. 245, 248, 249, 24 A. 599, 601; Commonwealth *v.* Wilkes-Barre & Scranton Rwy. Co. 162 Pa. 614, 621, 623, 29 A. 696, 698, 699; Commonwealth *v.* People's Passenger Rwy. Co., 183 Pa. 353, 354, 38 A. 1091, 1092; Commonwealth *v.* Lehigh Valley R. Co., 186 Pa. 235, 239, 240, 40 A. 491, 492; Commonwealth *v.* Lehigh Valley R. Co., 244 Pa. 241, 244, 90 A. 564, 565; Commonwealth *v.* Roxford Knitting Co., 268 Pa. 266, 268, 110 A. 720, 721; Commonwealth *v.* Lehigh & New England R. Co. 268 Pa. 271, 274, 110 A. 725; Commonwealth, ex rel. Baldrige *v.* Sun Oil Co., 294 Pa. 99, 102, 143 A. 495, 496, 60 A. L. R. 737; Com-

monwealth *v.* City of Harrisburg, 335 Pa. 202, 206, 6 A. 2d 863, 865.

Because of the views thus expressed it becomes unnecessary to determine whether the court below was right in speculating that the use of the word "resident" as applied to "treasurer" in section 18 of the Act of 1937 was a mere inadvertence on the part of the legislature or was used because of a natural assumption that domestic corporations would always have some office in the State where their fiscal functions would be performed. What is perfectly clear is this—that, under section 17 of the act, the bonds of a foreign corporation whose treasurer is a non-resident are not subject to the corporate loans tax but the bonds of all domestic corporations are so subject. It is further clear that in section 18, which provides for the collection of the tax and designates the "resident treasurer" of the corporation as the official to perform that duty, such designation is merely incidental and directory, and if, as here, the bonds are, under section 17, of the class subject to the corporate loans tax, it is ultimately the obligation of the corporation issuing them, or having assumed liability thereon, to retain the tax from the interest and pay it into the treasury of the State. Therefore, if the treasurer fails in that duty, or if there is no resident treasurer to perform it, the duty still remains as far as the corporation is concerned and the corporation must perform it through some other agent or official whether resident or non-resident. The result is that the bonds here in question are not subject under section 3 of the Act of 1937 to the state personal property tax in the hands of the Fidelity-Philadelphia Trust Co., fiduciary, as owner, holder, or possessor.

Decree affirmed; costs to be paid by appellant.

BLEED THROUGH – POOR COPY